# Melatrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-16 OF 2000(W)

WAN ADNAN ISMAIL CJ (MALAYA), STEVE SHIM CJ (SABAH AND SARAWAK) AND MOHAMED DZAIDDIN FCJ

13 MARCH 2003

***Companies and Corporations*** — *Receivership — Powers of receivers and managers to sell property — Sale and purchase agreement to sell lease — Receivers as agents of company — Whether receivers were free and empowered to dispose off assets of company — Whether notwithstanding a valid power of attorney contained in a debenture, can the receivers and managers appointed under the said debenture could proceed to sell the property charged under the National Land Code by private treaty*

The first respondent was the registered proprietor of the lease of a piece of land held under qualified title ('the said lease'). The first respondent executed a debenture ('the said debenture') in favor of the second respondent as security for banking facilities granted by the latter. Later, the first respondent executed a first legal charge over the said lease under the National Land Code ('the NLC') which was duly registered. The second respondent exercised their rights under the said debenture and appointed a receiver and manager ('the R&M') of all the assets and undertakings of the first respondent. Clause 12.2 of the said debenture empowered the R&M to act as agent of the first respondent and clause 12.2(c) further empowered the R&M to effect the sale of the asset secured by the said debenture after taking possession of them. By clause 12.5(a), the R&M was also irrevocably appointed the lawful attorney of the first respondent. The R&M entered into a sale and purchase agreement with the appellant to sell the said lease. The appellant however did not wish to proceed with the said purchase on the ground that the R&M did not have the power to sell the said lease by private agreement in view of the Supreme Court decision of *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805. The first respondent filed an originating summons in the Kuala Lumpur High Court for a declaration that the R&M was duly empowered by the said debenture to sell the said lease. The High Court granted the declaration. The appellant appealed against the decision. The Court of Appeal dismissed the appeal. Leave to appeal was granted on the following question of law: 'Notwithstanding a valid power of attorney contained in a debenture, can the receivers and managers appointed under the said debenture proceed to sell the property charged under the NLC by private treaty?'

**Held**, answering the question in the positive and dismissing the appeal:

(1) From the facts in *Kimlin*, it was abundantly clear that in that case the debenture created by the appellant in favor of the first

respondent did not contain an express provision appointing the receivers and managers as attorney of the appellant. Secondly, in that case the appellant went into liquidation. Hence, it was the liquidator who opposed the application for sale under the debenture in the High Court, and later caused an appeal to be brought before the Supreme Court. Thus, on the given facts, the court had no reason to disagree with the ratio decidendi of the Supreme Court in *Kimlin* except to make one observation that the Supreme Court did not consider the position of the receiver and manager as the agent of the appellant company which went into liquidation (see p 201B–D).

(2) The court agreed with the submissions of the first respondent that there were distinguishing features in *Kimlin* and in the instant case. While *Kimlin* dealt with the rights and remedies of parties under a statutory charge over land under s 256 of the NLC, clearly the section provided a prescribed method of sale to be undertaken by a chargee not a chargor. In the instant appeal, the sale was undertaken by the R&M on behalf of the first respondent, the chargor of the said lease. The provisions of NLC prescribing for judicial sale could not apply to the facts in the instant appeal because the R&M was acting as agent of the chargor. The ratio decidendi of *Kimlin* could not apply to the instant appeal (see p 201D–F, I); *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (In liquidation) v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805 distinguished.

**Obiter:**

The question which the Federal Court answered did not involve a question of general principle decided for the first time or a question of importance upon which further argument and its decision would be to public advantage. What the Federal Court answered was simply whether the facts in the instant appeal were similar to the facts in *Kimlin* and not whether they raised a new question of law decided for the first time (see p 202A–B).

**[Bahasa Malaysia summary**

Responden pertama adalah tuanpunya berdaftar pajakan sebidang tanah yang dipegang di bawah hak milik bersyarat ('pajakan tersebut'). Responden pertama telah menyempurnakan satu debentur ('debentur tersebut') menyebelahi responden kedua sebagai cagaran untuk kemudahan kewangan yang diberikan olehnya. Selepas itu, responden pertama telah memasukkan satu gadaian sah ke atas pajakan tersebut di bawah Kanun Tanah Negara ('KTN tersebut') yang telah didaftarkan. Responden kedua telah melaksanakan hak-hak mereka di bawah debentur tersebut dan telah melantik seorang penerima dan pengurus ('P&P tersebut') untuk semua aset-aset dan akujanji-akujanji responden pertama. Fasal 12.2 debentur tersebut

A memberi kuasa kepada P&P tersebut untuk bertindak sebagai ejen responden pertama dan fasal 12.2(c) seterusnya memberikan kuasa kepada P&P tersebut untuk melaksanakan jualan aset yang dicagarkan oleh debentur tersebut setelah mengambil milikan ke atasnya. Melalui fasal 12.5(a), P&P tersebut juga telah dilantik sebagai wakil sah responden pertama. P&P tersebut telah memasuki satu perjanjian B jualbeli dengan perayu untuk menjual pajakan tersebut. Perayu bagaimanapun tidak berhasrat untuk meneruskan jualan tersebut atas alasan bahawa P&P tersebut tidak mempunyai kuasa untuk menjual pajakan tersebut melalui satu perjanjian persendirian berdasarkan *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805. C Responden pertama telah memfailkan satu saman pemula di Mahkamah Tinggi Kuala Lumpur untuk satu deklarasi bahawa P&P tersebut mempunyai kuasa, melalui debentur yang berkenaan, untuk menjual pajakan tersebut. Mahkamah Tinggi telah memberikan deklarasi yang dipinta. Perayu telah merayu terhadap keputusan D tersebut. Mahkamah Rayuan telah menolak rayuan tersebut. Kebenaran untuk merayu telah dibenarkan berdasarkan persoalan undang-undang berikut: 'Notwithstanding a valid power of attorney contained in a debenture, can the receivers and managers appointed under the said debenture proceed to sell the property charged under the NLC by private treaty?'

E

**Diputuskan**, menjawab persoalan secara positif dan menolak rayuan:

(1) Dari fakta-fakta dalam *Kimlin*, ia adalah amat jelas bahawa dalam kes tersebut debentur yang dibuat oleh perayu menyebelahi F responden pertama tidak mengandungi satu peruntukan nyata tentang perlantikan penerima dan pengurus sebagai wakil sah perayu. Keduanya, dalam kes tersebut perayu telah melalui proses likuidasi. Justeru itu, ia adalah pelikuidasi yang membangkang permohonan jualan di bawah debentur di Mahkamah Tinggi, dan kemudian menyebabkan satu rayuan dimulakan di hadapan G Mahkamah Agong. Oleh itu, berdasarkan fakta-fakta yang diberikan, mahkamah tiada sebab untuk tidak bersetuju dengan ratio decidendi Mahkamah Agong dalam *Kimlin* kecuali untuk membuat satu pemerhatian bahawa Mahkamah Agong tidak mengambilkira kedudukan penerima dan pengurus sebagai ejen syarikat perayu yang melalui proses likuidasi (lihat H ms 201B–D).

(2) Mahkamah bersetuju dengan hujah-hujah responden pertama bahawa terdapat ciri-ciri yang berbeza dalam *Kimlin* dan dalam kes semasa. Di mana *Kimlin* membincangkan tentang hak-hak dan remedi-remedi pihak-pihak di bawah satu gadaian I statutori ke atas tanah di bawah s 256 KTN, dengan jelas seksyen tersebut memperuntukkan satu cara jualan yang perlu dilaksanakan oleh seorang pemegang gadai dan bukan seorang

penggadai. Dalam rayuan semasa, jualan tersebut telah dilaksanakan oleh P&P tersebut bagi pihak responden pertama, penggadai pajakan tersebut. Peruntukan-peruntukan KTN untuk jualan penghakiman tidak terpakai kepada fakta-fakta dalam rayuan semasa kerana P&P tersebut bertindak sebagai ejen penggadai. Ratio decidendi *Kimlin* tidak terpakai dalam rayuan semasa (lihat ms 201D–F, I); *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (In liquidation) v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805 dibeza.

**Obiter**:

Persoalan yang dijawab oleh Mahkamah Persekutuan tidak melibatkan satu persoalan tentang prinsip am yang telah diputuskan buat pertama kalinya atau satu persoalan tentang kepentingan di mana hujah selanjutnya dan keputusannya akan mendatangkan kebaikan untuk orang awam. Apa yang telah dijawab oleh Mahkamah Persekutuan adalah hanya sama ada fakta-fakta dalam rayuan semasa sama dengan fakta-fakta dalam *Kimlin* dan bukan sama ada ia menimbulkan persoalan undang-undang baru yang diputuskan buat pertama kali (lihat ms 202A–B).]

**Notes**

For cases on powers of receivers and managers to sell property, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 505–506.

**Cases referred to**

*Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 (distd)

**Legislation referred to**

Companies Act 1965 s 108
Contracts Act 1950 s 24
Courts of Judicature Act 1964 s 78(1)
National Land Code ss 206(3), 256(2)
Powers of Attorney Act 1949 ss 3(2), 4(1)

**Appeal from:** Civil Appeal No W–02–620 of 1997 (Court of Appeal, Kuala Lumpur)

*Ng Chew Hor* (*Steven Chia Quek Seng* with him) (*Iqbal Hakim, Sia & Voo*) for the appellant.

*DP Naban* (*Nitin Nadkarni, Douglas Yee* and *Sunita Abraham* with him) (*Lee Hishammuddin*) for the first respondent.

*Lim Chee Wee* (*Skrine*) for the second respondent.

**Mohamed Dzaiddin FCJ** (delivering judgment of the court): This is an appeal from the decision of the Court of Appeal concerning the powers of the receivers and managers appointed under the debenture to sell the property charged under the National Land Code ('the NLC') by private treaty.

On 24 July 2002, we granted leave to appeal on the following question of law: notwithstanding a valid power of attorney contained in a debenture, can the receivers and managers appointed under the said debenture proceed to sell the property charged under the NLC by private treaty?

*Brief facts*

The first respondent is the registered proprietor of the lease of a piece of land held under qualified title HS(D) 143155 PTD 80563, Mukim of Plentong, District of Johor Bahru, Johor ('the said lease').

On 30 June 1992, the first respondent executed a debenture in favor of the second respondent as security for banking facilities granted by the latter. Later, the first respondent executed a first legal charge over the said lease under the NLC which was duly registered on 18 July 1992.

On 9 February 1994, the second respondent exercised their right under the said debenture and appointed one Lim Tian Huat of Messrs Arthur Andersen & Co as the receiver and manager ('R&M') of all the assets and undertakings of the first respondent. Clause 12.2 of the debenture empowered the R&M to act as agent of the first respondent and cl 12.2(c) further empowered him to effect the sale of the asset secured by the debenture after taking possession of them. By cl 12.5(a), the R&M is also irrevocably appointed the lawful attorney of the first respondent.

On 2 July 1996, the R&M entered into a sale and purchase agreement with the appellant to sell the said lease subject to the terms and conditions contained therein. The appellant however did not wish to proceed with the said purchase on the ground that the R&M did not have the power to sell the said lease by private agreement in view of *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805.

On 10 September 1997, the first respondent filed an originating summons in the Kuala Lumpur High Court for a declaration that the R&M was duly empowered by the said debenture to sell the said lease.

On 20 September 1997, the learned judge granted the declaration and ruled as follows (at p 63 of the appeal record):

> I find as a fact that the administrative receivers/managers are the authorized agents of the company under the debenture and as such are authorized to enter into any sale and purchase agreement on the assets of the company; subject however to the obtaining of the prior consent of the debenture holder and which consent was freely given by the second defendants to the court. Therefore, the need on the part of the receivers/managers in any way invoicing the Orders of the High Court 1980 [sic] only became applicable where such sale is proceeded by the charge under its foreclosure proceedings and not where the chargor so proceeds with the sale by consenting parties.

> I hold that under these circumstances, the administrative receivers/managers as agents of the company are absolutely free and empowered to dispose of the assets of the company; and their act binds the company.

The appellant appealed against the above decision. The Court of Appeal dismissed the appeal and ordered that each party to bear its own costs. In the main, the Court of Appeal was in total agreement with the submission of the learned counsel for the first respondent that the ratio in *Kimlin* did not apply to the case under appeal because of several distinguishing features. In its judgment (at pp 324–325 of the appeal record) the court stated:

> (a) in *Kimlin*, the chargor company was wound up and consequently, the receivers and managers ceased to be agents of the chargor company;
>
> (b) in the present case, the chargor was not wound up;
>
> (c) the debenture under consideration here empowers a receiver and manager appointed under the debenture to act as agents of the first respondent, in the exercise of the powers accorded to the receiver and manager under the debenture;
>
> (d) the debenture under consideration here contains a validly constituted power of attorney clause, irrevocably appointing the receiver and manager as the lawful attorney of the first respondent;
>
> (e) the provisions of the Code [National Land Code] deal with the powers of the chargee to sell land charged under the Code so that any receiver and manager appointed by the creditor of the charged property must conform to the Code;
>
> (f) at any time before an order for sale is made, a chargor can sell land charged under the provisions of the Code by way of private treaty where the proceeds of sale are sufficient to settle the outstanding debt or where the chargee consents;
>
> (g) where an order for sale has been obtained, the charged land must be sold by public auction, subject to the right of the charger to pay off its indebtedness to the chargee in full to the registrar of the court before the sale of the charged land, under the provisions of s 266 of the Code;
>
> (h) the first respondent in the present case, as the registered proprietor of the lease, is entitled to deal with the lease in such manner as a registered proprietor would, subject to the rights of the encumbrancer, namely, the second respondent.
>
> We hasten to add that in *Kimlin*, it was the borrower company that was complaining about the sale apart from being wound up whereas here it is the borrower company that is asking for the sale order and it has never been wound up.

*Appeal before us*

The thrust of the argument for the appellant was that the question should be answered in the negative following *Kimlin*.

Mr Ng Chew Hor submitted that in the present case, the R&M in entering into the said agreement with the appellant had acted at the instance

A and under the direction of the second respondent and therefore the said sale was an attempt to avoid the requirements of complying with the provisions of the NLC for a judicial sale of the said lease. Secondly, he contended, the right and powers of the R&M to sell the said lease when there exists a registered charge under the NLC is void. Thirdly, the power of attorney contained in the debenture contravened the NLC and is void under s 24 of
B the Contracts Act 1950.

Mr Naban, for the first respondent, submitted that *Kimlin* could not apply because the ratio decidendi of the case was based on a completely different set of facts. Counsel highlighted the following distinguishing features in *Kimlin*:

C

1 in *Kimlin*, the chargor/company was wound up and consequently, the R&M ceased to be agents of the chargor/company but instead became agents of the chargee;

2 the chargor/company (the first respondent) in the instant case was not wound up and consequently, unlike *Kimlin*, the R&M remained as
D agent of the first respondent;

3 the debenture in *Kimlin* contained no express provision appointing the R&M as attorneys of the chargor/company;

4 in the instant case, the debenture empowers the R&M to act as the lawful attorney and agent of the first respondent and to exercise the
E powers accorded under the debenture.

The facts in *Kimlin*, taken from the headnote (at p 806), were these. The appellant, the borrower company, was the registered proprietor of certain lands ('the lands'). The appellant executed two legal charges ('the charges') under the NLC over the lands in favor of Bank Bumiputra (M) Bhd ('the
F first respondent') to secure banking facilities granted to the appellant. The charges were duly registered under s 108 of the Companies Act 1965 ('the Act'). Subsequently, the appellant executed a deed of debenture in favor of the first respondent to secure various banking facilities ('the debenture') whereby the appellant created both a fixed charge and a floating charge. The debenture was duly registered pursuant to s 108 of the Act. The
G debenture provided, inter alia, for the bank to appoint receivers and managers and for such receivers and managers to have certain powers. Subsequently, events occurred upon which the powers to appoint receivers and managers under the debenture became exercisable. On 13 August 1987, pursuant to such powers, the bank duly appointed the second, third and fourth respondents as receivers and managers of the appellant
H ('receivers and managers').

Since there was no express provision in the debenture appointing them attorneys of the appellant and being desirous of selling the lands without resorting to proceedings under the NLC to obtain a judicial sale, the receivers and managers applied to the High Court by way of originating
I summons for leave to sell the lands. On 27 February 1989, the appellant went into liquidation and the application by the receivers and managers was opposed by the liquidator.

The learned judge held that:

(1) the receivers and managers were entitled to sell the lands which were subject to the charges, without taking proceedings under the NLC to obtain a judicial sale;

(2) the fact that a company has been put into liquidation does not affect the securities held by the receivers and managers; at least not until the secured creditors had been fully paid off.

The secured creditors could therefore dispose of the securities despite the liquidation. The trial judge further said that receivers and managers were entitled to what the debenture provided for. The liquidator, being dissatisfied with the judgment of the court below appealed.

Counsel for the first respondent relied on s 206(3) of the NLC which provides that the provisions of the NLC requiring a dealing to be effected in the statutorily prescribed manner shall not affect the contractual operation of any transaction relating to alienated land or any interest therein.

The question for decision was whether the learned judge was right in holding that the receivers and managers were entitled to sell the lease which was subject to the charges without taking proceedings under the NLC to obtain a judicial sale.

Based on the facts, the Supreme Court, after considering the 'nature and characteristics of a charge under NLC, the rights and powers incidental to such a security' (at p 817) and following *Dass on The Torrens System in Malaya* at p 429, paras 2–3, held, inter alia, as follows:

(1) Under common law mortgage, the rights and powers of the mortgagee are those which are incidental to the legal or equitable estate vested in him in his role as mortgagee; whereas in the statutory charge under the NLC, the rights and powers of the chargee are not derived from such estate since none is vested in him and so his rights and powers must flow from the relevant provisions of the NLC with the charge taking effect as a security only, enforceable by proceedings in court to obtain a judicial sale.

(2) The provisions of the NLC as to the rights of chargors are designed for their protection and could not be waived nor could the chargor contract himself out of the NLC. It follows, therefore, that no power of sale could be conferred by a chargor under the NLC on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the procedure laid down in the NLC. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default, by a debenture or power of attorney and the necessity for obtaining a judicial sale, would be invalid and ineffective to entitle a purchaser to be regarded as owner.

(3) The provisions of the NLC setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are

A exhaustive and exclusive and any attempt at contracting out of those rights — unless expressly provided for in the NLC — would be void as being contrary to public policy.

Therefore, the receivers and managers were not entitled to sell the charged lands by virtue of the powers conferred upon them by the debenture without B taking proceedings under the NLC to obtain a judicial sale.

*Conclusion*

From the facts in *Kimlin*, it is abundantly clear to us that the debenture dated 29 June 1985 created by the appellant in favor of the first respondent C did not contain an express provision appointing the receivers and managers as attorneys of the appellant. Secondly, on 27 February 1989, the appellant went into liquidation. Hence, it was the liquidator who opposed the application for sale under the debenture in the High Court, and later caused an appeal to be brought before the Supreme Court.

D Thus, on the given facts, we have no reason to disagree with the ratio decidendi of the Supreme Court in *Kimlin*, except to make one observation that the Supreme Court did not consider the position of the receiver and manager as the agent of the appellant company which went into liquidation.

We agree with *Kimlin* that Pt XVI of the NLC deals with the rights and remedies of parties under a statutory charge over land. Section 256(2) of the E NLC provides:

> Any application for an order for sale under this Chapter by a *chargee* of any such land or lease shall be made to the court in accordance .... (Emphasis added.)

Clearly, the section provides a prescribed method of sale to be undertaken F by a chargee, not a chargor. In the instant appeal, however, the sale was undertaken by the R&M on behalf of the first respondent, the chargor of the said lease. In our view, the provisions of the NLC prescribing for judicial sale could not apply to the facts in the instant appeal because the R&M was acting as agent of the chargor.

G Mr Ng Chew Hor, for the appellant, also submitted that the power of attorney given to the R&M under the debenture was an attempt to avoid the effect of and was but a means to contract out of the provisions of the NLC and was therefore void. Looking at the debenture in the appeal record, we are satisfied the said power of attorney complied with ss 3(2) and 4(1) of the Powers of Attorney Act 1949. In our view, the R&M could act and exercise H the power under the debenture. We therefore find no merit in counsel's contention that the power of attorney was a means to contract out of the provision of the NLC.

Finally, we agree entirely with the Court of Appeal and Mr Naban's submission that there are distinguishing features in *Kimlin* and in the instant I appeal.

For reasons stated above, it is our conclusion that the ratio decidendi of *Kimlin* cannot apply to the instant appeal.

We would therefore answer the question in the positive. However, this is not the end of the matter. In our view, the question which we have just answered does not involve a question of general principle decided for the first time or a question of importance upon which further argument and its decision would be to public advantage. What we have just answered was simply whether the facts in the instant appeal are similar to the facts in *Kimlin* and not whether they raise a new question of law decided for the first time. On hindsight, leave to appeal should have not been granted.

Finally, in view of s 78(1) of the Courts of Judicature Act 1964, this reserved judgment is given in the absence of the presiding judge, who passed away on 24 December 2001. My learned brother, Steve Shim CJ (Sabah and Sarawak) has read this judgment in draft with which he agreed.

This appeal is therefore dismissed with costs and the deposit be paid out to the respondents to account of taxed costs.

*Appeal dismissed.*

Reported by Peter Ling